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No. 09-1319

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HINKLE OIL & GAS, INCORPORATED, AN OKLAHOMA CORPORATION, PETITIONER,

v.

BOWLES RICE MCDAVID GRAFF & LOVE, LLP, A WEST VIRGINIA LIMITED LIABILITY PARTNERSHIP; CHARLES B. DOLLISON; JULIA A. CHINCHECK; DOES 1 - 100; MARC MONTELEONE; GERARD STOWERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY TO POINTS RAISED BY RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. PETITIONER TIMELY AND PROPERLY RAISED THE BANKRUPTCY APPROVAL ARGUMENT IN THE COURTS BELOW

Respondents claim that Petitioner did not raise many of its bankruptcy approval arguments in the district court and nothing in the Fourth Circuit's opinion suggests that the court addressed the merits of Petitioner's argument on appeal (Resp.12) and that although "the primary thrust of Petitioner's argument is that certiorari is warranted for this Court to review the applicability of certain bankruptcy code provisions and federal bankruptcy rules ... those provisions were not properly raised and argued by Petitioner in the district court, were nor addressed or analyzed on appeal by the Fourth Circuit, and have no application to the facts of this case in any event" (Resp. 13).

Respondents' claim is erroneous on two counts.

First, the district court and the directly addressed that specific issue (Pet. App. 19a – 20a). Footnote 4 of the district court opinion actually emphasizes that the court was presented with, and did consider, the very question (Pet. App.26-a). The district court chose to traverse the precise point raised by Hinkle: **If there had been an upset bid – and there was – then, absent an objection by Elk River to its own contract, the bankruptcy court would have approved the highest upset bid (after auction) as a matter of course.**

Second, the Fourth Circuit also dealt directly with the issue. The Court of Appeal compounded the district court's error when, completely ignoring the plain language of the Trustee's upset bid notice, the Fourth Circuit said (Pet.App. 5-a), "The upset bid included a proposed purchase agreement that, by its own terms, was subject to the approval of the court." **This statement totally misstates and turns on its head the actual wording of the notice, which is contained at Pet. 4.**

Contrary to Respondents' position, the Fourth Circuit did indeed consider the primary point raised by Petitioner (Pet. App. 7-a), The Fourth Circuit fully recognized Petitioner's point when it stated, at FN 5 (Pet. App. 10a – 11a):

> "Although Hinkle argues that the bankruptcy court's approval was not required, the evidence in the record strongly supports the *inference* that the trustee would not have acted without the court's approval. ... Therefore, *whether or not the approval was legally required* there is absolutely no support for the assumption that the trustee would have reversed course and attempted to finalize the Hinkle sale without the court's approval." (Emphases supplied).

Although Petitioner has demonstrated that the primary issue it argues was, in fact, argued before and analyzed by the lower courts, Petitioner, in the interest of completeness, examines the cases cited by Respondents for the proposition that if a question may not have been directly raised, it may not be considered

by this court. Such an argument misapprehends the law.

In *Singleton v. Wulf*, 428 U.S. 106, 120, 49 L.Ed.2d 826, 96 Sup. Ct. 2868 (1976), for example, while Respondents cites the first sentence of the section correctly, they err by not stating the entire section of the opinion, which reads:

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it."

Respondents likewise cite *United States v. Galletti*, 541 U.S. 114, 120, n.2, 158 L.Ed.2d 279, 124 Sup. Ct. 1548 (2004) for the proposition that Petitioner has forfeited the argument by failing to raise it in the court below. Once again, Respondents err by citing a *portion* of the section without citing the *entire* section, which, in this case, reads:

> "Respondents argue that ... Respondents have forfeited this argument by failing to raise it in the courts below. Indeed, the closest respondents have come to arguing that the state limitations period applies was in the Court of Appeals, when respondents argued that 'under California law, any collections suit filed against a partner to collect a partnership debt is subject to the statute limitation provision which applies to the underlying debt of the partnership.' (Citation to its brief). *This argument, of course, is contrary to respondents' position in this Court.* (Emphasis supplied).

Respondents rely on *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 160 L.Ed.2d 548, 125 Sup. Ct. 577 (2004). Once again, Respondent should quote the entire paragraph, not a single sentence. That opinion states:

> "We *ordinarily* do not decide in the first instance issues not decided below. (Citation). Although we have deviated from this rule in exceptional circumstances, (Citation), the circumstances here cut *against* resolving the §107 claim. Both the question whether Aviall has waived this claim and

> the underlying §107 question (if it is not waived) may depend in part on the relationship between §§107 and 113. *That relationship is a significant issue in its own right. It is also well beyond the scope of the briefing and, indeed, the question presented, which asks simply whether a private party "may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1)." Pet. for Cert. i. The § 107 claim and the preliminary waiver question merit full consideration by the courts below.* (Emphasis supplied)."

Rather, Petitioner asserts that the Court should rather consider that holding in *United States v. Mendenhall*, 446 U.S. 544, 552, fn. 5, 64 L.Ed.2d 497, 100 Sup. Ct. 1870 (1980):

> "While the Court ordinarily does not consider matters neither raised before nor decided by the courts below (Citation), it has done so in exceptional circumstances. (Citations). We consider the Government's contention that there was no seizure of the respondent in this case, because the contrary assumption, embraced by the trial court and the Court of Appeals, rests on a serious misapprehension of federal constitutional law. And because the determination of the question is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari. This Court's Rule 23(1)(c). (Citations). The evidentiary record in the trial court is adequate to permit consideration of the contention. The material facts are not disputed. A major question

> throughout the controversy has been whether the respondent was at any time detained by the DEA agents. Counsel for the respondent has argued that she was arrested while proceeding through the concourse. The trial court and the Court of Appeals characterized the incident as an 'investigatory stop.' But the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to determine. (Citations)."

Thus, Respondents' attempt to raise the "not raised below" argument has no merit when considered in the context of what was presented to both lower courts and, even more, when faced with the stated decision of the lower courts.

II. RESPONDENTS' ARGUMENT THAT "THIS IS A POOR VEHICLE FOR CERTIORARI" HAS NO MERIT.

After trying to convince this Court that the decision of the lower courts is correct on the merits (Resp. Reply 16-19) and that error alone does not warrant certiorari (Resp. Reply 19-21), Respondents raise three novel arguments:

1. This case has never involved an interpretation of the Constitution or revolved around any other important federal question. (Resp. Reply 19).
2. This case not raise legal questions of extraordinary significance. In fact, resolution of the instant case has never even depended

upon an interpretation of this Court's prior precedents. (Resp. Reply 19-20); and

3. The decision below is unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than this Petitioner and these Respondents. (This ignores the fact that the district court opinion was indeed a published opinion, 617 F.Supp.2d 447 (W.D. Va., 2008)).

These points have no merit.

A. THE CASE CONCERNS IMPORTANT FEDERAL QUESTIONS.

11 U.S.C. §363(c)(1) allows the Trustee to sell property of the estate in the ordinary course of business without notice or hearing. The two-pronged test for "in the ordinary course of business" is: (1) Would a creditor expect notice and a hearing on the contemplated transaction because of its unusual nature? and (2) Is the contemplated transaction ordinary for the particular type of business concerned?

Buffalo Properties owned 293 oil and gas wells, 274 of them (93.5%) in West Virginia and 19 of them (6.5%) in Kentucky. Whether it would reasonably be expected that a company engaged in oil and gas explorations would sell off 6½% of its wells at any given time is a legitimate question of fact, there will always be times when a business will need extra capital to take advantage of opportunities or to pay bills; Likewise, any business is motivated by the opportunity for profit, and this would mean that if a well could be sold for

more than it took to operate it, profit would be a compelling reason to sell that well.

Selling *a part* (6½ %) of Buffalo's assets would be something that would reasonably be contemplated in the ordinary course of business. Selling *the whole* of its assets would not. Therefore, Petitioner had a *reasonable expectation* that its upset bid, absent an objection by Elk River would successfully lead to a sale in accordance with the notice (Pet. 4).

Respondents are hoisted to their own petard when they state:

> "The high bidder at the auction offered to pay $7,000,000 for all of Buffalo's assets, whereas Petitioner could only muster $500,000 to purchase a portion of Buffalo's properties. Buffalo's trustee garnered $6.5 million *more* for the debtor's assets than Hinkle was able to offer" (Resp. 2-3; 9-10). "In the end [the Bankruptcy Court's decision for alternative sale procedures] garnered $7,000,000 for Buffalo's creditors – fourteen times *more* than Petitioner's $455,000 upset bid" (Resp. 18).

The obvious inference is that Petitioner was trying to "steal" the 19 Kentucky wells for a bargain basement price. But this facially attractive accusation fails utterly when subjected to even a preliminary analysis. $7,000,000 for 293 wells equals $23,891 per well. $23,891 x 19 wells equals $453,925, which is $1,075 *less* than Petitioner's original upset bid and $46,075 *less* than Petitioner's final bid at the alternative proceeding

auction. Thus, the end result was that the estate garnered *less* per well than Petitioner had offered.

The first important federal question here is the interpretation of 11 U.S.C. §363 (c)(1) re what is a sale in the ordinary course of business and what is – and is not – procedurally required in such a sale. (Pet. 19-23).

The second, equally important Federal Question, concerns the necessity for – and the definition of – a "hearing" under 11 U.S.C. §363(b) in the event of a sale "other than in the ordinary course of business." (Pet. 27-28).

It is critically important in light of conflicting Federal authority (Pet 16-28) for this Court to define where the authority of the Trustee to act without the independent consideration of the Bankruptcy Court begins and ends.

B. THIS CASE RAISES LEGAL QUESTIONS OF SUFFICIENTLY SUBSTANTIAL SIGNIFICANCE TO WARRANT CERTIORARI.

Respondents assert, at Resp. 19-20, "[This case] does not raise legal questions of extraordinary significance. In fact, as the lower courts' decisions make crystal clear, resolution of the instant case has never even depended upon an interpretation of this Court's prior precedents."

If we accept Respondent's reasoning, then there would never be a need for a Supreme Court at all because the lower courts could simply rule as they

wished, without the benefit of a "Court of Last Resort" to determine whether the lower courts were correct or incorrect in their opinions.

It is for *this* Court – not the lower courts and not the respondents – to determine whether or not the questions raised by Petitioner here are sufficiently important to merit a review of the lower courts' decisions, and whether or not to allow the lower courts to traverse their boundaries by deciding issues of fact as a matter of law rather than determining whether or not there *are* issues of fact to be determined by the trier of fact.

C. THE GRANT OF CERTIORARI IN THIS CASE WOULD CERTAINLY APPLY TO A FAR GREATER POPULATION THAN THIS PETITIONER AND THESE RESPONDENTS.

With respect, Respondents' final argument, that "As an unpublished decision, [this case has] little precedential value [and] does not apply to anyone other than this Petitioner and these Respondents," (Resp. 21) is patently absurd.

A plethora of significant cases that have become before this Court which involved only one "party" on each side, *e.g.*, *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803); *Dred Scott v. Sandford*, 60 U.S. 393, 15 L.Ed. 691 (1856); Miranda *v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 Sup.Ct. 1602 (1966); *Bush v. Gore*, 531 U.S. 98, 148 L.Ed.2d 388, 121 Sup.Ct. 525.

The most recent of those cases could be framed in the context of Respondent's positioning of the instant case, *i.e.* one of two candidates will emerge as the President of the United States. In the microcosmic view espoused by Respondent, the result of this case would be meaningful to only one man. However, the more realistic macrocosm demonstrated that this decision affected every citizen of the United States and a great number of people far beyond the borders of this nation.

Likewise, in the instant case, the most recent financial meltdown has sharply increased the number of bankruptcies filed by the populace. Debtors, creditors, potential purchasers of assets from the bankrupt estate, and trustees themselves need to know to what extent they can rely on the word of the Trustee, the contract written up by the Trustee, and the respective powers of the Trustee, on the one hand, and the Bankruptcy Court on the other. Strangely, there have been no Supreme Court decisions since the 1968 case of *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 464, 7 L.Ed.2d 458, 82 Sup. Ct. 486 (1962) which delineate the respective roles of the Trustee and the Bankruptcy Court in handling sales of estate assets under the new Bankruptcy Law which went into effect 25 years after that decision.

CONCLUSION

For all of the reasons stated in the original petition and in this reply, the Supreme Court should grant certiorari in this important case.

Respectfully submitted,

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